

W (Children)

[2010] UKSC 12

03/03/2010

Barristers

Kate Branigan KC

Court

The Supreme Court

Practice Areas

Public Children Law

Summary

The presumption against requiring a child to attend court to give evidence in family proceedings could not be reconciled with the need to strike a fair balance between rights protected by the European Convention on Human Rights 1950 art.6 and those protected by art.8. A court considering whether to call a child as a witness would have to weigh the advantages that it would bring to the determination of the truth against the damage it might do to the welfare of that or any other child.

Facts

The appellant father (F) appealed against a decision ([2010] EWCA Civ 57) upholding the refusal of his application to require his 14-year-old stepdaughter (C) to attend court to give evidence during care proceedings.

The care proceedings had begun in respect of C and her half-siblings after C had made allegations of serious sexual abuse against F. The judge refused F's application to require C to attend and give evidence at a fact-finding hearing held in relation to her allegations, and the Court of Appeal upheld that decision. The result of the judge's order was that C's evidence at the fact-finding hearing would be confined to the interview which she had given to the police under the "achieving best evidence" (ABE) guidance. F was also awaiting a criminal trial for offences against C.

F argued that there should be no presumption against a child giving evidence, as that gave insufficient weight to the rights of all concerned under the European Convention on Human Rights 1950.

Held

(1) The presumption against a child giving evidence could not be reconciled with the approach of the European Court of Human Rights, which always aimed to strike a fair balance between competing Convention rights, LM v Medway Council [2007] EWCA Civ 9, [2007] 1 F.L.R. 1698, R. v B CC Ex p. P [1991] 1 W.L.R. 221, P (A Minor) (Witness Summons), Re [1997] 2 F.L.R. 447 and W (Children) (Care Order: Sexual Abuse), Re [2009] EWCA Civ 644, [2009] 2 Cr. App. R. 23 overruled. Article 6 required that

the proceedings overall be fair, and that normally entailed an opportunity to challenge evidence presented by the other side. However, even in criminal proceedings, account had to be taken of the art.8 rights of the perceived victim. Striking that balance in care proceedings might well mean that the child was not called in the great majority of cases, but that was a result, and not a presumption. A court considering whether a child should be called would have to weigh the advantages that it would bring to the determination of the truth against the damage it might do to the welfare of that or any other child. In weighing the advantages of calling the child, the court would have to consider: whether it could determine the case without making findings on particular issues; whether, because of the quality of the evidence it already had, there would be nothing useful to be gained from the child's oral evidence; the quality of any ABE interview; the nature of any challenge a party might wish to make, as the court would be unlikely to be helped by generalised accusations of lying, or by a fishing expedition, though focused questions putting forward a different explanation for certain events could help; and the age and maturity of the child and the length of time since the events in question. In considering the risk of harm to the child, the court should consider: the child's age and maturity, and the length of time since the events; the support the child had from family and other sources; the child's wishes, as an unwilling child should rarely, if ever, be obliged to give evidence; the views of the child's guardian and, where appropriate, those with parental responsibility; the risk of delay to the proceedings; and, where there were parallel criminal proceedings, the potential increased risk of harm from the likelihood of the child having to give evidence twice. On both sides of the equation, the court had to factor in the steps to be taken to improve the quality of the child's evidence and at the same time to decrease the risk of harm. The family court was not limited by the usual courtroom procedures or to applying the special measures used in criminal cases by analogy. The important thing was that the questions which challenged the child's account were fairly put to the child, not that counsel could question the child directly. The possibilities included pre-recorded video cross-examination, cross-examination by video link, and questioning via an intermediary. The question of whether C should be called was remitted to the judge. (2) The approach in private family proceedings between parents should be the same in principle, although there were specific risks. Abuse allegations were not made by a neutral local authority, but by a parent seeking to gain advantage. That did not mean they were false, but it did increase the risk of exaggeration or fabrication. Further, the child would not routinely have the protection of a CAFCASS guardian, and there were many more litigants in person in private proceedings, meaning that the court would have to take very careful precautions to ensure the child was not harmed if he or she gave evidence.

Permission

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